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No.

In The

Supreme Court of the United States

October Term, 1997

RONALD J. TURNER, as Administrator of the Estate of CHARLOTTE M. TURNER, and individually,

Petitioner,

vs.

FALLON COMMUNITY HEALTH PLAN, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Whether or not as a matter of law ERISA preempts all state law rights and remedies in an instance where the Petitioner alleges that the Petitioner's intestate was denied rights and benefits due her under an insurance contract as a result of arbitrary, illegal, capricious and unreasonable decisions by the Respondent which were not made in good faith and which were a breach of Respondent's fiduciary duty to the Petitioner's intestate.

B. Whether or not as matter of law the federal court is obligated to establish a federal common law remedy with respect to violations of ERISA for which no remedies are specifically set forth under ERISA.

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Petitioner Ronald J. Turner, Executor of the estate of Charlotte Turner, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this proceeding on October 20, 1997.

OPINIONS BELOW

The decision of the Court of Appeals is reported at 127 F.3d 196 (1st Cir 1997). The two opinions of the District Court are unreported. All of the said decisions are reproduced as an Appendix at the end of this petition.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 12. The judgment of the Court of Appeals was entered on October 20, 1997.

STATUTORY PROVISION INVOLVED

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* ("ERISA")

STATEMENT OF THE CASE

This case arises out of the death of Charlotte M. Turner. Petitioner, Ronald J. Turner, individually and as administrator of the Estate of Charlotte M. Turner, brought this matter in the Massachusetts Superior Court alleging claims of breach of contract, breach of implied covenant of good faith and fair dealing, wrongful death, loss of consortium and negligent and/or intentional infliction of emotional distress. Respondent, Fallon Community Health Plan, Inc., removed the case to the United States District Court for the District of Massachusetts,

at which time Petitioner amended his Complaint to state a claim under ERISA and agreed to voluntarily dismiss, without prejudice, the state law claims while reserving his right to assert them at a later time. The ERISA claim alleged a denial of benefits that was arbitrary, illegal, capricious, unreasonable and not made in good faith and was a breach of fiduciary duty.

Shortly thereafter, the Respondent filed a Motion for Summary Judgment with respect to which Petitioner filed a Motion under Fed. R. Civ. P. 56(f) for a Continuance so that he could conduct the necessary discovery to oppose Respondent's Motion. By a Memorandum and Order dated May 10, 1996 ("Order"), the District Court (Gorton, J.) denied the Motion for Continuance. In doing so, the Court acknowledged that "Plaintiff has made an authoritative proffer in a timely manner of the facts which Plaintiff seeks to discover." The District Court, however, ruled that Petitioner's attempts to defeat the Motion would be futile because

> ERISA preempts any claim plaintiff could raise against Fallon, and that Mrs. Turner's death has effectively eliminated any chance of recovery under that statute.

By its ruling, ("First Ruling") the District Court raised issues theretofore not raised by the parties.

Petitioner then filed a Motion for Reconsideration to address the preemption issue raised *sua sponte* by the District Court and a Motion to Amend Complaint to reassert his state law claims.

By Memorandum and Order dated February 5, 1997, ("Second Ruling") the District Court denied the Petitioner's Motion for Reconsideration, denied the Petitioner's Motion to

Amend the Complaint to add state law claims and granted the Respondent's Motion for Summary Judgment.

The matter was appealed to the United States Court of Appeals for the First Circuit. It was argued before the Court and a decision was issued by the court on October 20, 1997.

The Petitioner appealed therefrom by filing this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

The legal issues in the case at bar have importance that far transcend the case involving the Petitioner's decedent, Charlotte Turner, (hereinafter referred to as "Charlotte").

Charlotte was a registered nurse, a wife and a mother of two children. She was diagnosed as having breast cancer. Her husband worked for General Motors Corporation and Charlotte had a health care insurance plan through General Motors Corporation. General Motors Corporation contracted with Fallon Community Health Plan, Inc. ("Fallon") to administer the said plan. Charlotte's cancer had metastasized. Normal chemotherapy was not a viable treatment. Although Fallon, by written contract, had excluded bone marrow transplants for solid tumors (such as Charlotte's) the plan had been amended to provide for bone marrow transplant under a technique or program carried on by Dana Farber, a well known hospital specializing in the treatment of cancer and located in Boston, Massachusetts. However, Charlotte did not qualify for the Dana Farber treatment because of the type of cancer that she had and the fact that it had spread to too many areas of her body. Fallon had further amended its plan so that treatment by institutions other than Dana-Farber would be considered on a case by case basis; and a determination of whether or not any such other institution was suitable to

provide treatment would be made by a committee of Fallon employees. Both Charlotte's oncologist who was associated with Fallon and another doctor who was associated with Fallon recommended that Charlotte be sent to Duke University's Medical School ("Duke") for a special treatment for Charlotte's type of cancer. Said treatment was considered by the doctors to be the best and only chance for assistance in prolonging Charlotte's life. Over thirty insurance companies had agreed to cover the cost of the type of treatment that was being considered at Duke. Charlotte had to go through the in-house appellate process of Fallon and, notwithstanding the fact that two of Fallon's doctors recommended it, Fallon's committee refused to pay the $100,000 or more cost associated with the treatment at Duke. By the time the committee hearings were over and the in-house appellate procedure was over, the cancer had spread too far and Duke was no longer a viable treatment. Charlotte died shortly thereafter.

The situation as it exists today is that the legal principles that appear to govern Charlotte and people in Charlotte's position are as follows: ERISA does not have any specific provision which permits a lawsuit on behalf of deceased people for monetary damages. ERISA only has provisions that have been held applicable to equitable relief, but not for monetary damages. Charlotte, and people like her, under the existing interpretation of the law, are denied the right to recover monetary damages after their death even though their death was caused by a breach of fiduciary obligation, breach of contract, negligence or a variety of other state court claims. The reason for this denial is that ERISA has been held by the Supreme Court to pre-empt all state court statutory and common law remedies.

The basic questions involved in the case at bar are two-fold and they are as follows:

(1) Does ERISA call for mandatory pre-emption of state law and common law remedies involving the ability of a Plaintiff to bring a lawsuit against a health care organization for breach of contract or for negligence or for improper administration or for breach of fiduciary obligations or other causes of action of a similar nature; and

(2) Whether or not the Federal Courts have the right and/or obligation under ERISA to establish a federal common law in instances where ERISA provides no relief.

The two leading cases in this area are *Pilot Life Insurance Company v. Dedeaux,* 48 U.S. 41, 95 L. Ed. 2d 39, 107 S. Ct. 1549 (1987) and *Massachusetts Mutual Life Insurance Company, et al. v. Russell,* 473 U.S. 134, 87 L. Ed. 2d 96, 105 S. Ct. 3085 (1985). Those two cases established a very clear principle of law. Those two cases stated, in essence, that ERISA pre-empts the state court and state common law remedies; and, in addition, ERISA provides no remedy for monetary damages under circumstances when the party Petitioner (Charlotte) has deceased.

There is no real split in the Circuit Courts. The Circuit Courts have been following the decisions of the Supreme Court. However, in many, many cases, the Circuit Courts and/or the Trial Courts have expressed a dismay at having to rule against the party Petitioner. Even in the case at bar, the Trial Court used the word "sadly" in describing its feelings in ruling against the Petitioner. Furthermore, lawyers all over the United States have attempted to chip away at the doctrines espoused in the aforesaid two leading cases. As a result, there are numerous cases which have struggled to make distinctions which strain the imagination and legal reasoning. There have been cases which have attempted to transform situations such as the situation involving Charlotte into malpractice cases or into a case involving violation of the American Disabilities Act because

those causes of action do not appear to be involved in the pre-emption doctrine. Some of these cases strain credulity. In an effort to obtain relief for their clients, lawyers all over the country are attempting to be innovative when innovation should not be necessary.

The rationale for the aforesaid pre-emption argument was based on the *Massachusetts Mutual* case and the *Pilot Life* case. Let us examine those cases because they involve fact situations that were not nearly as dramatic and compelling as the many cases that have come before the Court since those two decisions.

In the *Massachusetts Mutual* case the facts involved a woman who was a beneficiary under two employee benefit plans that were governed by ERISA. She originally brought her lawsuit based on interruption in benefits for approximately six months. Although she ultimately received her benefits, she sued alleging a breach of fiduciary duty based on the allegedly improper refusal to pay benefits during the period in question and she sought to hold the employer, as a fiduciary, personally liable for extracontractual compensatory and punitive damages. The Supreme Court held that ERISA did not provide for extracontractual compensatory or punitive damages caused by the improper or untimely processing of benefit claims. The decision was written by Justice Stevens. However, there was a very important concurrence by Justices Brennan, White, Marshall and Blackmun. In the concurrence, the Justices stated very clearly that they were not ruling on to what extent extracontractual damages were available. This question had not been addressed by the courts below and was not briefed by the parties.

The concurring Justices were quite clear that they did not agree with any interpretation of the majority decision which would or could be held to limit certain forms of action against fiduciaries. Those Justices stated as follows on page 109:

> Moreover, some of the Court's remarks are simply incompatible of the structure, legislative history, and purposes of ERISA. The Court's ambiguous discussion is certainly subject to different readings . . .

In the *Pilot Life* case the Court dealt with a fact situation involving an employee who began to collect permanent disability benefits under a long term disability benefit plan by purchasing a group insurance policy. After two years the insurance company terminated the employee's benefits then reinstated and terminated the benefits several times during the following three years. The Supreme Court, reversing the Court of Appeals, held that ERISA pre-empted state common law tort contracts action for a variety of reasons.

Thus, the two cases which provided the language upon which the lower courts built an impenetrable pyramid of pre-emption logic were based on cases that did not involve deaths or significant tragedies such as the case at bar and the many, many other cases which have since come before the Supreme Court and other federal courts. This appears to be a classic case of language used to correctly support the logic in the *Massachusetts Mutual* case and *Pilot Life* case having been used altogether too literally to rule on more sophisticated cases.

Succeeding courts throughout the federal system built on the language of those two cases. Succeeding decisions which reached the Supreme Court built on the language of the Pilot case and the language of the *Massachusetts Mutual* case until what started off as basically sound decisions on non-controversial fact situations became hard-bound law applicable to sophisticated and complex fact situations. This was not, and certainly should not have been, the intention of the Supreme Court when it made the decisions in the *Pilot Life* case and the *Massachusetts Mutual* case.

The basic fact situation which is present in the case at bar, and present in over a hundred cases throughout the country in the last few years, involve an insured person in a managed care plan or under an HMO administered plan who is denied medical treatment by the administrators of the plan. The allegation is that the administrators administered the plan improperly or negligently or committed a breach of fiduciary obligations or breached a contract, or all of the above. The patient would have no trouble in bringing a lawsuit under ERISA to force the provider to give the patient the treatment required under the appropriate plan documents. That is normal equitable relief. The problem occurs when the patient dies before the patient has had an opportunity to go to the Court for equitable relief. The patient's death may well have been caused by the exact same causes of action that would have permitted the Petitioner to obtain equitable relief if the Petitioner had gone to Court when the Petitioner was alive and when the Petitioner was still eligible for treatment. But when the Petitioner has failed to do the foregoing, on the same set of facts the Petitioner is denied relief for monetary damages.

These circumstances are far removed from the purposes for which ERISA was formed. This set of facts is an affront to common sense and to the people of this country who believe that ERISA was meant to serve them and to serve them fairly and equitably.

Apparently the basic legal theory brought about by the *Pilot Life* case and the *Massachusetts Mutual* case is that ERISA was presumably all encompassing and it did not specifically state that one could sue for monetary damages under the terms of ERISA. The Supreme Court correctly stated that it did not specifically provide for monetary damages but the Supreme Court probably erred in making a determination that it was by congressional intent. It would be next to impossible to envision

a congressman or senator who would take credit for passing a statute deliberately intending to place citizens in the position of Charlotte, who died before being able to seek equitable relief, from obtaining monetary relief.

There have been clear indications from the Supreme Court that some of the Justices are unhappy with the present situation and that they recognize the somewhat tragic situation that the gradual interpretation of the *Pilot Life* case and the *Massachusetts Mutual* case has brought about. This Court is referred to the following:

1. In a strongly worded dissent in the case of *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125, 121 L. Ed. 2d 513, 113 S. Ct. 580 (1992) Justice Stevens stated that there is a burgeoning volume of litigation involving ERISA pre-emption claims and that it is time to take a fresh look at the intended scope of the pre-emption provision that congress enacted. It is to be noted that Justice Stevens was the Justice who wrote the majority decision for the *Massachusetts Mutual* case. Justice Stevens stated that common sense should not be left at the Courthouse door. This Court is specifically referred to the following quotation by Justice Stevens at 121 L. Ed. 2d at page 524:

> Thus the federal statute displaces state regulation in the field that is regulated by ERISA; it expressly disavows an intent to supersede state regulation of exempt plans; and its text is silent about possible pre-emption or state regulation of subjects not regulated by the federal statute. *Thus, if we were to decide this case on the basis of nothing more than the text of the statute itself, we would find no pre-emption* (more precisely no "supersession") of the District's regulation of health benefits for employees

> receiving worker's compensation *because that subject is entirely unregulated by ERISA.* [emphasis supplied]

2. This Court's attention is also referred to the case of *California Division of Labor Standards Enforcement v. Dillingham Construction Co. N.A Inc., et al.*, 519 U.S. __, 136 L. Ed. 2d 791, 117 S. Ct. __ (1997). Justice Scalia, in a decision with which Justice Ginberg joined, discussed the influx of cases regarding the interpretation of ERISA and its pre-emption of state law. Justice Scalia argues that one should not do *"obeisance to all our prior cases, instead of acknowledging that the criteria set forth in some of them have in effect been abandoned"*. Justice Scalia stated that the portion of ERISA known as the "relate to" portion (the "relate to" theory means that anything that relates to ERISA is pre-empted) is a failure. He stated that the statutory test is an illusory test unless the "Court is willing to decree a degree of pre-emption that no sensible person could have intended — which it is not". Justice Scalia said as follows:

> I think it would greatly assist our function of clarifying the law *if we simply acknowledged that our first take on this statute was wrong; that the "relate to" clause of pre-emption provision is meant, not to set forth a test for pre-emption, but rather to identify the field in which the ordinary "field pre-emption"* applies — namely the field of laws regulating "employee benefit plans described in section 1003(a) of this title —" [citation omitted]. [emphasis supplied].

Justice Scalia went on to say that he does not believe that congress intended to alter traditional pre-emption analysis and that ordinary field pre-emption is what is supposed to be applicable to ERISA. Ordinary "field pre-emption" has

previously been defined as permitting pre-emption of a federal statute when the area covered by the statute totally covers the entire field. *See Service Engineering Co. v. Emmery,* 100 F.3d 659 (9th Cir. 1996). Clearly ERISA does not occupy the entire field of common law remedy involved in the case at bar and it certainly does not occupy and cover the field of monetary damages because ERISA does not even mention monetary damages.

3. The Court is also referred to the fact that in the decision of the First Circuit in the case at bar there is a concurring opinion from Senior Circuit Judge Hill which states, in essence, that Charlotte's remedy is a remedy to be provided by the legislative branch. The Court is also referred to *Andrews-Clarke v. Travelers Co.*, 1997 W.L. 677932 (D. Mass.), 21 Employment Benefits Cases 2137. In deciding this case District Court Judge William G. Young describes the current state of the law involving the issues discussed in this brief as "ridiculous" and issued a strong appeal to congress to amend ERISA so that patients may sue for wrongful death or personal injuries caused by improper refusal of an insurer to authorize treatment.

The decision is a blistering indictment of the present interpretation of the *Pilot Life* and *Massachusetts Mutual* cases. But the argument set forth by Judge Hill and Judge Young is an argument for legislative relief rather than judicial relief. The Petitioners's contention in the case at bar is that the relief is not required from the legislature in order to correct an inaccurate interpretation of ERISA; but the relief is required by a judicial acknowledgement that cases with fact situations such as the case at bar were never meant to be included in the pre-emption sweep of ERISA for at least two reasons. These reasons are: (1) that ERISA nowhere mentions the ability or lack of ability to obtain monetary damages under circumstances involving death by negligence and therefore field pre-emption is not applicable;

and (2) the mere fact that ERISA permits or ordains that the federal courts institute a federal ERISA common law is a clear acknowledgement that there is an area of general law that was not covered or ordained or mandated by the scope of ERISA. The Court is referred back to Justice Stevens' reference to worker's compensation. The unfortunate decision in cases such as the case at bar is that legislation is not necessary to rectify what is an inherent error of interpretation of ERISA which started off in 1985 and 1987 as sound judgment on certain sets of facts but which has grown like topsy to become a detriment to justice and fair play.

CONCLUSION

Based on the above, it is respectfully submitted that the Writ of Certiorari should be granted and that the Supreme Court be allowed to revisit the *Pilot Life* case and the *Massachusetts Mutual* case.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED OCTOBER 20, 1997

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 97-1253

RONALD J. TURNER, AS ADMINISTRATOR OF THE ESTATE OF CHARLOTTE M. TURNER, AND INDIVIDUALLY,

Plaintiff, Appellant,

v.

FALLON COMMUNITY HEALTH PLAN, INC.,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Nathaniel M. Gorton, *U.S. District Judge*]

Before

Boudin, *Circuit Judge,*

Hill,* *Senior Circuit Judge,*

and Pollak,** *Senior District Judge.*

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* Of the Eleventh Circuit, sitting by designation.

** Of the Eastern District of Pennsylvania, sitting by designation.

Appendix A

* * *

October 20, 1997

BOUDIN, *Circuit Judge.* Ronald Turner, on behalf of himself and as administrator of the estate of his deceased wife, Charlotte Turner, brought this suit in Massachusetts state court against Fallon Community Health Plan, Inc. ("Fallon"). The gravamen was Fallon's refusal to provide coverage for a treatment regime proposed by Charlotte Turner and her doctor to address her mestastasized breast cancer. After the case was removed to federal district court, the district court granted summary judgment for Fallon, and Ronald Turner appealed.

The pertinent facts are largely undisputed. In 1991, Charlotte Turner was diagnosed with breast cancer. The disease was at first treated by surgery, chemotherapy and radiation. In May 1993, tests showed that the cancer had mestastasized, was beyond control by conventional therapies, and threatened Charlotte Turner with death within 12 to 18 months. Ronald Turner was employed by General Motors, and Charlotte Turner was covered by the health coverage that Fallon provided for family members of General Motors employees.

Fallon is a health maintenance organization that provides or reimburses health care for its members. Its "Member Handbook," which is presented as "part of [the member's] contract with [Fallon]," describes in detail the various medical costs that Fallon will cover for beneficiaries. Among the express *exclusions* set forth in the handbook was "bone marrow transplant for treatment of solid tumors. . . ." Dr. Ronald Hochman, Charlotte Turner's oncologist at Fallon, nevertheless concluded that Charlotte Turner's only hope was an autologous

bone marrow transplant, a procedure by which the patient's own bone marrow is extracted, stored and then reintroduced after the patient receives high dosage chemotherapy. Marrow is the source of vital white blood cells needed to fight infection and without the transplant procedure, the high dosage chemotherapy would impair the bone marrow's ability to continue to produce white blood cells.

In May 1993, Fallon approved Charlotte Turner's request that she be evaluated by Dana Farber Cancer Institute for possible participation in its bone marrow transplant program. Fallon continued to assert that a bone marrow transplant was not a covered procedure for solid tumor cancer but said that if the treatment was recommended by Dana Farber, the request for coverage would be reviewed further by Fallon. Ultimately, Dana Farber concluded that Charlotte Turner was not eligible for the Dana Farber protocol because cancer cells had already been detected in Charlotte Turner's bone marrow.

Charlotte Turner then asked Fallon to cover her examination for eligibility to enter a program being conducted by the Duke University Medical Center. In this program, Duke not only removed bone marrow for reimplantation, in aid of high dosage chemotherapy, but also employed procedures to attempt to "purge" the marrow of its cancer cells. Fallon declined to cover the cost of a "third opinion." Charlotte Turner then had herself examined by doctors at the Duke program who concluded that she might be eligible to participate, subject to further testing. The cost of her participation in the program was estimated at $100,000.

In July 1993, Charlotte Turner and Dr. Hochman asked Fallon to pay for her inclusion in the Duke program. In August

1993, Fallon's Transplant Committee met to consider Charlotte Turner's request and the broader question whether coverage should be extended, on a case-by-case basis, to bone marrow transplants to treat solid tumor cancers either under the Dana Farber protocol or the Duke program or both. Dr. Hochman supported Charlotte Turner's application for coverage to the Duke program.

The Transplant Committee decided that, despite its handbook exclusion, it would in the future extend coverage for the Dana Farber protocol if it concluded in the particular case that the treatment was critically necessary and showed a strong likelihood of success. If concluded, however, that the Duke program had as yet produced no adequate data suggesting a likelihood of success, and therefore declined to extend coverage for the Duke program. At Charlotte Turner's request, Fallon's Grievance Committee held a hearing in September 1993 to review the decision of the Transplant Committee, but in early October 1993, the Grievance Committee upheld the denial of coverage for the Duke program.

Immediately after the Grievance Committee's decision in October 1993, Charlotte Turner underwent conventional low-dosage chemotherapy without bone marrow transplantation. She died on August 17, 1994. Ronald Turner then brought suit in the Massachusetts superior court against Fallon charging it with breach of contract, wrongful death and other state-law claims. Fallon removed the case to federal district court on the ground that state-law claims were preempted under ERISA — the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq. See Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 66-67 (1987).

Ronald Turner responded by amending his complaint to delete the state claims and to substitute a claim under ERISA. The amended single-count complaint charged that Fallon's denial of coverage for the Duke program "denied Charlotte of the rights and benefits due under the policy and was arbitrary, illegal, capricious, unreasonable and not made in good faith and was a breach of [Fallon's] fiduciary duty which it owed to Charlotte." The complaint sought damages and a trial by jury.

In March 1996, Fallon moved for summary judgment. Ronald Turner opposed the motion and asked for further discovery, which Fallon in turn opposed. The district court then ruled that a civil ERISA action could be brought by a plan beneficiary only (in the words of the statute) "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). Concluding that Ronald Turner's damage action was not authorized by ERISA, the court ruled that the case had to be dismissed and that further discovery would be futile.

Ronald Turner then sought reconsideration and also sought to amend the complaint to reassert the previously withdrawn state-law claims. He argued that if ERISA provided no federal remedy, it ought not be read to preempt his state-law claims. Alternatively, he urged that if ERISA preempted the state-law claims, then a federal remedy ought to be inferred or created by the court to permit damages for wrongful withholding of treatment under the employee benefits plan. The district court wrote a thoughtful opinion denying these requests.

On this appeal, we begin with Ronald Turner's claim that ERISA should be read to confer a claim for damages where, as

charged in the amended complaint, a beneficiary of the plan has been denied "the rights and benefits due under the policy" or has suffered "a breach of . . . fiduciary duty" in the withholding of those benefits. ERISA is a comprehensive federal statute that governs not only pension plans but also nonpension benefit plans, including the General Motors health benefits plan at issue in this case.

ERISA sets forth a half dozen civil enforcement provisions. 29 U.S.C. § 1132(a). Under the first such provision, a beneficiary may bring a federal civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." *Id.* § 1132(a)(1)(B). The relief expressly provided is to secure benefits under the plan rather than damages for a breach of the plan. Here, treatment coverage is no longer of any significance.

The other pertinent remedial provision authorizes civil action by a beneficiary "to obtain other appropriate equitable relief" to address violations of ERISA or to enforce the plan. 29 U.S.C. § 1132(a)(3)(B). The Supreme Court recently held in *Varity Corp. v. Howe,* 116 S. Ct. 1065 (1996), that this provision may permit equitable relief against a plan administrator for breaches of the fiduciary duty imposed on such administrators by ERISA. *See id.* at 1075-79. But this provision is expressly limited to providing equitable relief, and equitable relief is not being sought in this case.

Ronald Turner points to no other specific remedial provision in ERISA that might arguably be brought into play in this case. In fact, the Supreme Court has stressed that ERISA does not create compensatory or punitive damage remedies where an

administrator of a plan fails to provide the benefits due under that plan. *See Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985); *see also Drinkwater v. Metropolitan Life Ins. Co.*, 846 F.2d 821, 825 (1st Cir.), *cert. denied*, 488 U.S. 909 (1988). This is not a minor technicality: damage awards may increase effective coverage but may also add significantly to the costs of coverage.

The lack of an express damage remedy under ERISA does not necessarily end the story. The federal courts have regularly inferred or created remedies in the shadow of federal statutes, although the practice has waned somewhat in recent years. *See, e.g., Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 94 (1981). But the Supreme Court has adamantly ruled that ERISA's express remedies are a signal to courts not to create additional remedies of their own. *Russell*, 473 U.S. at 145-48. *See also Reich v. Rowe*, 20 F.3d 25, 31-33 (1st Cir. 1994); *Drinkwater*, 846 F.2d at 824.

In the alternative, Ronald Turner argues that ERISA, if it provides no damage remedy of its own either expressly or by implication, should at least not be taken to preclude existing state remedies. Absent preemption, a health benefits plan like Fallon's could certainly be treated as a contract enforceable under state law and subject to the usual contractual remedies, including compensatory damages. Depending on the jurisdiction, state law might provide even more substantial relief, including punitive damages.

ERISA contains a vague but broadly worded preemption provision. With exceptions not relevant here, it provides that the pertinent subchapter of ERISA shall supersede any and all "State laws insofar as they may now or hereafter relate to any

employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a). However this general language might otherwise have been read, the Supreme Court has construed it to preclude state claims to enforce rights under an ERISA plan or obtain damages for the wrongful withholding of those rights, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52-57 (1987), and this construction has been repeatedly followed.[1]

The Supreme Court has recently set some new limits on preemption by holding that certain state laws were not sufficiently "related" to ERISA to deserve preemption. *See De Buono v. NYSA-ILA Medical & Clinical Servs. Fund*, 117 S. Ct. 1747, 1752-53 (1997); *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 117 S. Ct. 832, 842 (1997). But neither of these cases involved a state's attempt to provide state remedies for what is in essence a plan administrator's refusal to pay allegedly promised benefits. It would be difficult to think of a state law that "relates" more closely to an employee benefit plan than one that affords remedies for the breach of obligations under that plan.

Ronald Turner more or less admits that existing Supreme Court precedent is against him, both as to an implicit federal cause of action and the preemption of state claims. But he says that it is grossly unjust to deny any remedy, either state or federal, to compensate in damages the victim, family or estate of one who has been wrongfully denied promised healthcare benefits.

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1. *See, e.g., Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 144 (1990); *Carlo v. Reed Rolled Thread Die Co.*, 49 F.3d 790, 794 (1st Cir. 1995); *Rosario-Cordero v. Crowley Towing & Transp. Co.*, 46 F.3d 120, 126 (1st Cir. 1995); *Nash v. Trustees of Boston Univ.*, 946 F.2d 960, 964 n.8 (1st Cir. 1991); *Wickman v. Northwestern Nat'l Ins. Co.*, 908 F.2d 1077, 1082 (1st Cir.), *cert. denied*, 498 U.S. 1013 (1990).

Further, he argues that this gap provides a cruel incentive for plan administrators to withhold treatment or delay it as long as possible, since the claim for benefits may be mooted by the beneficiary's death.

There are in realty two quite different problems of law and policy entangled in this argument. The one that Ronald Turner seeks to present is the case of a beneficiary wrongfully denied promised benefits. There is reason to doubt that that is the true problem in *this* case (a point to which we will return), but such cases are easy to imagine and certain to occur. Compensatory damages are a conventional and potent remedy that might indeed deter misconduct and mitigate loss, although the cost of the plan would also be increased.

On the other hand, some might think it perverse to dwell on damage remedies, which apply where the patient has died or already suffered injury, and might urge instead that courts improve access to *equitable* relief. This remedy, already available under ERISA, can address a wrongful denial of benefits while the patient is still alive and unharmed. Although Ronald Turner says that such judicial relief is readily frustrated by exhaustion of remedies rules, a failure to exhaust is easily forgiven for good reason, and no reason is better than an imminent threat to life or health. *E.g., Portela-Gonzalez v. Secretary of the Navy,* 109 F.3d 74, 77 (1st Cir. 1997); *see also DePina v. General Dynamics Corp.*, 674 F. Supp. 46, 49 (D. Mass. 1987).

In all events, it is certainly a matter for reasonable debate whether a damage remedy should be added, either by judicial interpolation or by Congress. But only the Supreme Court could alter the existing case law that precludes such a remedy. And whether or not Congress ever thought about the impact on health

care in particular when it wrote ERISA's remedies and preemption provisions, Congress is well equipped to revisit the issue and alter the statutory language that now stands as a bar.

Although the question of a damages remedy is an important one, it likely has no practical importance in this case. The central obligation of Fallon to Charlotte Turner is fixed by the terms of the health plan, and it would be difficult to find an exclusion more unequivocal than Fallon's written exclusion of bone marrow transplant treatment for solid tumors. Even if Fallon were treated as having modified the contract in August 1997, the modification seemingly extended only to the Dana Farber program, for which Charlotte Turner was admittedly ineligible. Thus, anything akin to a contract claim looks almost hopeless on this record.[2]

Ronald Turner's position is not improved by invoking fiduciary concepts under ERISA. Beneficiaries may sue a plan for breach of fiduciary duty causing individual harm, but such suits are allowed only for equitable relief and, even then, only where Congress has failed to provide more specific relief. *See Varity Corp.*, 116 S. Ct. at 1079. Neither condition is met here since Ronald Turner seeks damages, not equitable relief, and his grievance — a denial of benefits — is specifically addressed by 29 U.S.C. § 1132(a)(1)(B).

Furthermore, Fallon also owes a duty to other plan

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2. Also asserted were state tort claims against Fallon, essentially for negligence in investigating the Duke program and for infliction of emotional distress. It is difficult to see how denial of an expressly excluded treatment could support a negligence claim; and assuming that Fallon could legally withhold treatment, any liability for inflicting emotional distress seems unlikely.

participants who have a continuing interest in the solvency of the plan and the expenditure of its funds for *covered* medical procedures. *See Varity Corp.*, 116 S. Ct. at 1078-79. The notion that there is a fiduciary duty on Fallon's part to expend funds for treatment explicitly excluded from the plan would be quite a stretch. This is not a case where Fallon promised without exclusion to cover any "appropriate" or "reasonable" procedure.

Thus, in all likelihood, the real problem confronting the Turners was not one of judicial remedies but a larger and more intractable one. It is a society-wide problem of when and how to provide last-chance health care for a courageous patient faced with a mortal disease who may have a small chance at survival if provided an expensive cutting edge treatment that she cannot afford out of her own resources. This is not the kind of problem to which courts can supply the solution.

Affirmed.

Concurrence follows.

HILL, *Senior Circuit Judge, specially concurring.* Appellant, recognizing that the statutory and case law compels the district court's grant of summary judgment to appellee, addresses entreaties to us which, if appropriate at all, are appropriate to the legislative branch.

Periodic accusations to the contrary notwithstanding, the courts are not legislative bodies.

I concur.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED FEBRUARY 5, 1997

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No.
95-40225-NMG

RONALD J. TURNER, AS ADMINISTRATOR OF THE ESTATE OF CHARLOTTE M. TURNER, AND INDIVIDUALLY,

Plaintiff

v.

FALLON COMMUNITY HEALTH PLAN INC.,

Defendant

MEMORANDUM AND ORDER

Gorton, J.

The above-entitled action was filed on December 11, 1995 by the plaintiff, Ronald J. Turner ("Turner"), against the defendant, Fallon Community Health Plan, Inc. ("Fallon"), alleging *inter alia,* that Fallon's denial of Turner's rights and benefits due under Fallon's health care policy was arbitrary and capricious in violation of ERISA, 29 U.S.C. § 1001 *et seq.* Plaintiff invokes this Court's jurisdiction pursuant to 28 U.S.C. §1331.

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Pending before this Court are the following six motions:

1) defendant's motion for leave to file opposition to plaintiff's motion to amend his Complaint to add state law claims in excess of twenty pages filed July 12, 1996;

2) defendant's motion for leave of court to file memorandum of points and authorities in support of its motion for summary judgment in excess of twenty pages filed March 25, 1996;

3) defendant Is motion to strike the plaintiffs demand for a jury trial filed March 25, 1996;

4) plaintiffs motion for reconsideration of this Court's memorandum and order dated May 10, 1996 filed June 12, 1996;

5) plaintiff's motion to amend complaint to add state law claims filed June 12, 1996; and

6) defendant's motion for summary judgment filed March 25, 1996.

I. *FACTUAL BACKGROUND*

Turner, an employee of General Motors Corporation ("GM"), was appointed Administrator of the Estate of his wife, Charlotte Turner. Before she died, Mrs. Turner was entitled to receive covered health care benefits from Fallon through Turner's employment with GM.

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Mrs. Turner was diagnosed with breast cancer in 1991, and in May, 1993, tests revealed that her disease had metastasized. Dr. Ronald Hochman, Mrs. Turner's oncologist, determined that she required an autologous bone marrow transplant ("ABMT"), and recommended that she enroll in the bone marrow transplant program operated by the Dana Farber Cancer Institute ("Dana Farber").[1] In June, 1993, Dana Farber determined that Mrs Turner's cancer had spread to her bone marrow, and that as a result, she did not meet the requirements for eligibility in the their program.

The Dana Farber physicians and Dr. Hochman then recommended that Mrs. Turner enroll in the bone marrow transplant program operated by the Duke University Medical Center ("Duke"). On July 19, 1993, Duke, after analyzing the results of medical tests, determined that Mrs. Turner met the requirements for eligibility in the Duke program.

Before August 23, 1993, the Fallon Handbook, upon which Fallon bases its medical coverage decisions, provided coverage for ABMT procedures, but only for treatment of "acute leukemia in remission, resistant non-Hodgkin's disease, recurrent or refractory neuroblastoma, or advanced Hodgkin's disease." The

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1. ABMT (also referred to as AuBMT) involves the extraction or "harvesting" of white blood cells from a patient's bone marrow. White blood cells, which are vital to the operation of the body's immune system, are removed in order to enable the patient to undergo high dose chemotherapy ("HDC") treatment which, ideally, destroys the cancer cells but also has the undesirable effect of destroying the white blood cells that remain in the body. After HDC, the patient's white blood cells are destroyed and the patient effectively has no immunity to disease. The previously harvested white blood cells then are transfused into the patient. Optimally, the white blood cells will multiply and revive the patient's immune system.

Handbook specifically excluded coverage for ". . . [s]ervices for any transplant or condition not listed above. This includes, but is not limited to bone marrow transplant for treatment of solid tumors or pancreas transplant."

In response to requests from Mrs. Turner and another patient of Dr. Hochman for coverage of ABMT procedures for solid tumor cancer, Fallon's Transplant Committee met on August 23, 1993, to review the respective protocols of the Dana Farber and Duke programs for the application of ABMT to solid tumor carcinoma. The Transplant Committee heard the medical opinions of Dr. Hochman and a Fallon surgical oncologist identified only as "Dr. Orr." The Transplant Committee also reviewed the then current literature on the use of ABMT in connection with solid cancer tumors.

Based upon the Transplant Committee's recommendation, Fallon extended coverage for ABMT to solid cancer tumors, but only in cases where 1) Dana Farber physicians determine that the patient meets Dana Farber's protocol criteria, and 2) the Fallon Transplant Committee determines that the patient has a critical need for the Dana Farber transplantation procedure and there is a strong likelihood of a successful clinical outcome for the particular patient. Mrs. Turner did not qualify for coverage under the amended Fallon Plan because she did not meet Dana Farber's protocol. Fallon ultimately denied her request for coverage for ABMT procedures to be performed by Duke and, after her final appeal for coverage under the Duke program was denied by Fallon, Mrs. Turner, on October 5, 1993, began chemotherapy treatment. Mrs. Turner died on August 17, 1994.

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II. *PROCEDURAL HISTORY*

Plaintiff filed a complaint in the Superior Court of Massachusetts, Worcester Division, on December 6, 1995, asserting claims of breach of contract, breach of implied covenant of good faith and fair dealing, wrongful death, loss of consortium, and negligent and/or intentional infliction of emotional distress. The case was removed to this Court on December 11, 1995, whereafter plaintiff amended his complaint to state a single claim of ERISA violation. On March 29, 1996, the plaintiff filed a motion for a continuance or other relief pursuant to Fed. R. Civ P. 56(f) which this Court denied on May 10, 1995. Pending before this Court are the above referenced six motions all of which are ripe for disposition.

III. *DISCUSSION AND ANALYSIS*

A. *Defendant's Motions for Leave to File Memoranda in Excess of 20 Pages.*

Defendant's motion for leave to file opposition to plaintiff's motion to amend his-complaint to add state law claims in excess of twenty pages and defendant's motion for leave of court to file memorandum of points and authorities in support of defendant's motion for summary judgment in excess of twenty pages set forth reasons why Fallon should be granted leave to file extended briefs. Defendant states that the highly technical-subject matter, i.e. medical treatment and explanations of the processes involved, necessitate the submission of briefs in excess of twenty pages. This Court accepts the explanation and will therefore, allow both motions.

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B. *Defendant's Motion to Strike the Plaintiff's Demand for a Jury Trial*

This is an action brought pursuant to 29 U.S.C. §1132 to determine whether Fallon properly denied Mrs. Turner's claim for benefit overage under an ERISA plan.[2] To determine whether a jury trial is available under a particular statute, courts must first look at the statute itself and then to its legislative history.

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2. The civil enforcement provisions of ERISA are found in Section 502 of the Act, codified at 29 U.S.C. §1132. The pertinent provisions read:

> a) Persons empowered to bring civil action. A civil action may be brought . . .
>
> 1) by a participant or beneficiary . . .
>
> B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> . . .
>
> 3) by a participant, beneficiary, or fiduciary A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or
>
> B) to obtain other appropriate; equitable relief
>
> i) to redress such violations or
>
> ii) to enforce any provisions of this subchapter or the terms of the plan.

Charlton Memorial Hosp. v. The Foxboro Co., 818 F.Supp. 456, 459 (D.Mass.1993). ERISA does not explicitly state or provide that a person with the standing to assert an ERISA claim has a right to a jury trial with respect to that claim. *Fuller v. Connecticut Life Ins. Co.*, 733 F.Supp. 462, 463 (D.Mass.1990). Although the issue has not yet been addressed by the First Circuit Court of Appeals, this United States District Court has consistently held that there is no right to a jury trial under ERISA. *Vartanian v. Monsanto Co.*, 880 F.Supp. 63 (D.Mass.1995); *Jorstad v. Connecticut General Life Ins. Co.*, 844 F.Supp. 46 (D.Mass.1994); *Charlton Memorial Hosp.*, 818 F.Supp. at 460; *Fuller*, 733 F.Supp. at 465. A majority of Circuit Courts has likewise held that no right to a trial by jury exists with respect to a claim for benefits based upon ERISA. *Borst v. Chevron Corp.*, 36 F.3d 1308 (5th Cir.1994), *cert. denied*, 115 S.Ct. 1699 (1995); *Houghton v. SIPCO, Inc.*, 38 F.3d 953 (8th Cir.1994); *Blake v. UnionMutual Stock Life Ins. Co. of America*, 906 F.2d 1525 (11th Cir.1990); *Turner v. CF&I Steel Corp.*, 770 F.2d 43, 47 (3d Cir.1985), *cert. denied*, 474 U.S. 1058 (1986); *Wardle v. Central States, S.E. and S.W. Areas Pension Fund*, 627 F.2d 820 (7th Cir.1980), *cert. denied*, 449 U.S. 1112 (1981). While sheer weight of opinion is not in itself sufficient reason for this Court to rule in a particular way, "it is often indicative that the road less traveled may be a dead end." *Fuller*, 733 F.Supp. at 463.

Most courts that have analyzed the legislative history of ERISA have concluded that a jury trial is not available under the statute. Those courts construe Congress' failure to provide such a right as conclusive evidence of an intent not to alter the common law of trusts under which no jury trial is available. *Wardle*, 627 F.2d at 830; *Fuller*, 733 F.Supp. at 463. The Supreme Court of the United States has found that:

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> ERISA abounds with the language and terminology of trust law. . . . ERISA's legislative history confirms that the Act's fiduciary responsibility provisions . . . 'codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.'

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 303, 110 (1988) (determining the appropriate standard of review in ERISA actions and quoting H.R. Rep. No. 93-533, p. 11 (1973)). In *Firestone*, the Court therefore, held that decisions under ERISA are to be "guided by principles of trust law." *Id.*

The Seventh Circuit Court of Appeals, after examination of ERISA's legislative history, specifically rejected the argument that the structure of ERISA evidences a congressional intent to provide for a jury trial. *Wardle*, 627 F.2d at 820. In *Wardle*, the plaintiff argued that because 29 U.S.C. §1132(a)(3) specifically authorizes participants to bring suit to enforce equitable rights, §1132 (a)(1)(B) must contemplate suits to enforce legal rights, which would entitle them to a jury trial. Otherwise, it was argued, that section would be superfluous. *Fuller*, 733 F.Supp. at 463 (citing *Wardle*, 627 F.2d at 828-29). The court in *Wardle* rejected the argument, however, reasoning that even if every claim brought under §1132(a)(1)(B) were equitable in nature, that section would not be superfluous because Congress granted to state courts concurrent jurisdiction over suits brought under that section but not under §1132(a)(3). *Wardle*, 627 F.2d at 829.

Because ERISA does not provide for a trial by jury and the majority of courts, within and without the First Circuit, have found no congressional intent to provide such a right, this Court concludes that the plaintiff is not entitled to a jury trial in this case.

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C. *Plaintiff's Motions for Reconsideration of This Court's Earlier Memorandum and Order and to Amend Complaint to Add State Law Claims*

In response to defendant's motion for summary judgment, the plaintiff filed a motion under Fed.R.Civ.P. 56(f) for a continuance so that he could conduct the necessary discovery to oppose defendant's motion. By a Memorandum and Order dated May 10, 1996, ("the Order"), this Court denied that motion. In doing so, it observed that plaintiff's attempts to defeat the motion would be futile because "ERISA preempts any claim plaintiff could raise against Fallon, and that Mrs. Turner's death has effectively eliminated any chance of recovery under that statute."

Turner now files this motion for reconsideration of the issue of preemption addressed by this Court in the Order. Consistent with this motion, Turner also has filed a motion to amend his complaint to reassert his state law claims. The crux of his argument in the latter motion is that this Court was incorrect in its conclusion of May 10, 1996 that "ERISA preempts any claim plaintiff could raise against Fallon, and that Mrs. Turner's death has effectively eliminated any chance of recovery under that statute." Plaintiff argues that Congress did not intend that ERISA would preempt state law claims where ERISA provides no remedy. In addition, he argues, ERISA does not preempt plaintiff's claims where, as here, the claim sounds in malpractice by the HMO rather than challenging a plan administration decision. Finally, Turner argues that this Court should fashion federal common law where, as here, ERISA does not provide an express remedy.

ERISA was enacted to provide a uniform set of federal regulations for dealing with employee benefit plans, the

regulation of which had previously been the province of various state laws. *See FMC Corp.* v. *Holiday*, 498 U.S. 52, 56-60 (1990). "The pre-emption clause [of ERISA] is conspicuous for its breadth." *Id.*, at 58. ERISA preempts all state laws that "relate to" employee benefit plans, whether or not the state laws are designed to affect employee benefit plans. *Id.*

In recent years, an increasing amount of state law actions have been brought against utilization review providers for the denial of claims for benefits. The majority rule that has developed is that such claims are preempted by ERISA, even where ERISA provides plaintiffs with no alternative remedy. Although the First Circuit Court of Appeals has yet to address this issue directly, in *Tolton v. American Biodyne, Inc.*, 48 F.3d 937 (6th Cir.1995), the Sixth Circuit specifically dealt with the question of whether ERISA preempted state law claims against a utilization review provider for wrongful death, improper refusal to authorize benefits, medical malpractice and insurance bad faith.

The plaintiff in *Tolton* was the administrator of the estate of Henry Tolton. Mr. Tolton had committed suicide and the plaintiff brought various state law claims against defendants alleging that the suicide resulted from defendant's refusal to authorize certain inpatient benefits under the employee benefits plan which covered Tolton. The defendants removed the case to federal district court on grounds of ERISA preemption, and then moved for summary judgment on the same grounds. The district court granted the defendant's motion for summary judgment and the plaintiff appealed.

Reviewing the decision of the district court *de novo*, the Sixth Circuit affirmed, holding that because plaintiff's claims

arose from the defendant's refusal to authorize psychiatric benefits to Tolton under the plan, and because there was no dispute that the health plan was covered by ERISA, the claims "clearly 'relat[ed] to' the benefit plan" and were therefore, preempted. *Id.*, at 942. The fact that Tolton was refused benefits pursuant to utilization review made no difference to the court, which explained that similar challenges to utilization review were found to be preempted in other circuits. *Id.* (relying on *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321 (5th Cir.) (ERISA preempted wrongful death claim against utilization review provider for refusal to authorize hospitalization for plaintiff who then lost her fetus), *cert. denied*, 113 S.Ct. 812 (1992), and also citing *Kuhl v. Lincoln Nat'l Health Plan*, 999 F.2d 298 (8th Cir.1993) (ERISA preempted wrongful death claim based upon delayed pre-authorization for surgery), *cert. denied*, 114 S.Ct. 694 (1994), and *Spain v. Aetna Life Ins. Co.*, 11 F.3d 129, 131 (9th Cir.1993) (ERISA preempted wrongful death claim based on withdrawal of authorization for surgery) *cert. denied*, 114 S.Ct. 1612 (1994)).

In its *Tolton* decision, the Sixth Circuit went on to cite additional reasons for its holding which are also informative with respect to the case at bar and plaintiff's arguments outlined above. The court rejected the plaintiff's argument, which is also made by the plaintiff here, that ERISA does not preempt its state law claims because ERISA provides no adequate alternative remedy. *Id.* at 943 (citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987)) An unfortunate consequence of ERISA preemption is, therefore, that plan beneficiaries or participants who bring certain kinds of state actions, e.g. wrongful death, may be left without a meaningful remedy. *Tolton*, 48 F3d at 943; *Corcoran*, 965 F.2d at 1338 ("The result ERISA compels us to reach means that the [plaintiffs] have no remedy, state or federal,

for what may have been a serious mistake."); *Settles v. Golden Rule Ins. Co.*, 927 F.2d 505 (10th Cir.1991) (no remedy for wrongful death action against ERISA health plan.); *Kuhl,* 999 F.2d at 298 (no remedy for plaintiff alleging husband's death resulted in delayed preauthorization for surgery.)

Sadly, the case at bar compels a like result. Plaintiff's state common law claims are preempted by the broadly sweeping arm of ERISA. Plaintiff is left without any meaningful remedy even if he were to establish that Fallon wrongfully refused to provide the Duke protocol treatment his wife urgently sought. Notwithstanding the merits of plaintiff's argument, this Court cannot legislate by judicial decree nor apply a statute, such as ERISA, other than as drafted by Congress.

The first step in this Court's analysis of plaintiff's claims is, therefore, to determine if the state laws under which he brings his claims against Fallon "relate to" GM's employee benefit plan. Plaintiff's state law claims as set forth in the proposed Second Amended Complaint include breach of contract, breach of implied covenant of good faith and fair dealing, wrongful death, loss of consortium and negligent and/or intentional infliction of emotional distress. Those claims all arise from Fallon's refusal to authorize the Duke protocol treatment for Mrs. Turner under the plan that GM had contracted with Fallon to provide for its employees. It is clear, therefore, that plaintiff's claims "relate to" the benefit plan. *Pilot Life*, 481 U.S. at 48; *Tolton,* 48 F.3d at 942.

D. *Defendant's Motion for Summary Judgment*

Because plaintiff's state common law claims outlined above are preempted by ERISA, he is left with only his claim under

ERISA. When pursuing a civil ERISA action, a claim may only be brought

> by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

29 U.S.C. §1132 (a)(1)(B). Here plaintiff is not seeking to recover benefits due to his wife under the terms of the Fallon Community Health Plan-which he was provided by his employer. Furthermore, any kind of injunctive relief to enforce Mrs. Turner's rights under the plan is no longer viable due to her unfortunate death.

The heart of plaintiff's ERISA claim is that Fallon's decision to deny Mrs. Turner coverage for treatment under the Duke protocol was arbitrary and capricious. This Court need not and will not, however, address the merits of that claim. The clear mandate of ERISA compels this Court to the unavoidable conclusion that plaintiff does not seek to recover benefits due to Mrs. Turner nor to clarify his rights to future benefits under the terms of his plan. Moreover, any rights Mrs. Turner may have once possessed under the plan are no longer viable. Finally, it is settled law that a claim for damages cannot fall under the purview of "other equitable relief" available to a successful ERISA litigant under §502(a)(3)(B)(i) thereof. *Mertens v. Hewitt Assocs.*, 113 S.Ct. 2063. Plaintiff does not have a justiciable claim against Fallon under ERISA and therefore summary judgment will, appropriately, be entered for defendant.

Whether plaintiff has other claims against other parties, as

suggested in defendant's opposition brief (which plaintiff may well have) is not an issue before this Court in these proceedings.

It is noted that utilization review mechanisms and procedures such as the HMO at issue in this case did not exist when Congress enacted ERISA in 1974. While the result in this case is consistent with the manifest intent of Congress neither to allow state law claims that "relate to" employee welfare benefit plans nor to afford a remedy under ERISA to beneficiaries in analogous situations to that of Mrs. Turner, the landscape of employee benefit plans has shifted dramatically in the past 23 years. The prevalent system of utilization review now in effect in most health care programs may warrant a reevaluation of ERISA by Congress so that its central purpose of protecting employees may be reconfirmed.

ORDER

For the foregoing reasons,

1) defendant's motion for leave to file opposition to plaintiff's motion to amend his complaint to add state law claims in excess of twenty pages, filed July 12, 1996, is **ALLOWED,**

2) defendant's motion leave of court to file memorandum of points and authorities in support of defendant's motion for summary judgment in excess of twenty pages, filed March 25, 1996, is **ALLOWED,**

3) defendant's motion to strike the plaintiff's demand for a jury trial, filed March 25, 1996, is **ALLOWED,**

4) plaintiff's motion for reconsideration of this Court's

memorandum and order dated May 10, 1996, filed June 12, 1996, is **DENIED,**

5) plaintiff's motion to amend complaint to add state law claims, filed June 12, 1996, is **DENIED,** and

6) defendant's motion for summary judgment, filed March 25, 1996 is **ALLOWED.**

So ordered.

s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated: February 5, 1997

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED MARCH 10, 1996

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 95-40225-NMG

RONALD J. TURNER, AS ADMINISTRATOR OF THE ESTATE OF CHARLOTTE M. TURNER, AND INDIVIDUALLY,

Plaintiff

v.

FALLON COMMUNITY HEALTH PLAN, INC.

Defendant

MEMORANDUM AND ORDER

GORTON, J.

The plaintiff in the above-entitled matter, Ronald J. Turner ("Turner"), filed the instant action against defendant, Fallon Community Health Plan, Inc. ("Fallon"), alleging, *inter alia*, that defendant's denial of plaintiff's rights and benefits due under defendant's health care policy was arbitrary and capricious in violation of ERISA, 29 U.S.C. § 1001 *et seq.* Pending before this Court is plaintiff's motion filed pursuant to Fed. R. Civ. P. 56(f), for a continuance or other relief.

Appendix C

I. *FACTUAL BACKGROUND*

Turner, an employee of General Motors Corporation ("GM"), was appointed Administrator of the Estate of his wife, Charlotte Turner. Before she died, Mrs. Turner was entitled to receive covered health care benefits from Fallon through Turner's employment with GM.

Mrs. Turner was diagnosed with breast cancer in 1991, and in May, 1993, tests revealed that her disease had metastasized. Dr. Ronald Hochman, Mrs. Turner's oncologist, determined that Mrs. Turner required an autologous bone marrow transplant ("ABMT"), and recommended that she enroll in the bone marrow transplant program operated by the Dana Farber Cancer Institute ("Dana Farber") In June, 1993, Dana Farber determined that Mrs. Turner's cancer had spread to her bone marrow, and that as a result she did not meet the requirements for eligibility in the Dana Farber program.

The Dana Farber physicians and Dr. Hochman then recommended that Mrs. Turner enroll in the bone marrow transplant program operated by the Duke University Medical Center ("Duke"). On July 19, 1993, Duke, after analyzing the result of medical tests, determined that Mrs. Turner met the requirements for eligibility in the Duke program.

Before August 23, 1993, the Fallon Handbook, upon which Fallon bases its medical coverage decisions, provided coverage for ABMT procedures, but only for the treatment of "acute leukemia in remission, resistant non-Hodgkin's disease, recurrent or refractory neuroblastoma, or advanced Hodgkin's disease. The Handbook specifically excluded coverage for "[s]ervices for any transplant or condition not listed above. This

includes, but is not limited to bone marrow transplant for treatment of solid tumors or pancreas transplant."

In response to requests from Mrs. Turner and another patient of Dr. Hochman for coverage of ABMT procedures for solid tumor cancer, Fallon's Transplant Committee met on August 23, 1993, to review the respective protocols of the Dana Farber and Duke programs for the application of ABMT to solid tumor carcinoma. The Transplant Committee heard the medical opinions of Dr. Hochman and a Fallon surgical oncologist identified only as "Dr. Orr." The Transplant Committee also reviewed the then current literature on the use of ABMT in connection with solid cancer tumors.

Based upon the Transplant Committee's recommendation, Fallon extended coverage for ABMT to solid cancer tumors, but only in cases where (1) Dana Farber physicians determine that the patient meets Dana Farber's protocol criteria, and (2) the Fallon Transplant Committee determines that the patient has a critical need for the Dana Farber transplantation procedure and there is a strong likelihood of a successful clinical outcome for the particular patient.

Mrs. Turner did not qualify for coverage under the amended Fallon Plan, because she did not meet Dana Farber's protocol. Fallon ultimately denied Mrs. Turner's request for coverage for ABMT procedures to be performed by Duke. After her final appeal for coverage under the Duke program was denied by Fallon, Mrs. Turner, on October 5, 1993, began chemotherapy treatment. Sadly, Mrs. Turner died on August 17, 1994.

II. *PROCEDURAL HISTORY*

Plaintiff filed a complaint in the Superior Court of

Massachusetts, Worcester Division, on December 6, 1995, asserting claims of breach of contract, breach of implied covenant of good faith and fair dealing, wrongful death, loss of consortium, and negligent and/or-intentional infliction of emotional distress. The case was removed to this Court on December 11, 1995, whereafter plaintiff amended his complaint to state a single claim of ERISA violations. Fallon moved for summary judgment on March 25, 1996, and shortly thereafter, plaintiff responded by filing the instant motion for a continuance or other relief pursuant to Fed. R. Civ. P. 56(f). Turner opposes that motion.

III. DISCUSSION

A. *Applicable framework*

Fed. R. Civ. P. 56(f) states that

> Should it appear from the affidavits of a party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

To obtain relief under Rule 56(f), plaintiff must (1) provide an authoritative proffer of the facts required to be discovered, (2) provide that proffer in a timely manner, (3) demonstrate good cause for his inability to adduce the facts essential to oppose the motion for summary judgment, (4) demonstrate the utility of the discovery, and (5) demonstrate the materiality of the facts.

See Resolution Trust Corp. v. North Bridge Associates. Inc., 22 F.3d 1198, 1203-07 (1st Cir. 1994). The First Circuit has stated that these requirements

> are not inflexible and that district courts are vested with considerable discretion in their administration. In the exercise of that discretion, one or more of the requirements may be relaxed, or even excused, to address the exigencies of a given case. When all five requirements are satisfied, however, a strong presumption arises in favor of relief. Unless the movant has been dilatory, or the court reasonably concludes that the motion is a stalling tactic or an exercise in futility, it should be treated liberally.

Id., at 1203 (citations omitted).

B. *Legal analysis*

Defendant does not dispute that plaintiff has made an authoritative proffer in a timely manner of the facts which plaintiff seeks to discover, so he must simply satisfy the final three prerequisites for relief under Rule 56(f) set forth in the *North Bridge Associates* decision.

1. *Good cause for plaintiff's inability to adduce the facts essential to oppose defendant's motion for summary judgment*

Plaintiff has the burden of showing good cause for his inability to adduce the facts essential to oppose defendant's motion for summary judgment in order to obtain a continuance under Rule 56(f). *See North Bridge Associates*, 22 F.3d at 1203-06; *Paterson-Leitch Co., Inc. v. Massachusetts Municipal*

Wholesale Elec. Co., 840 F.2d 985, 988 (1st Cir. 1988). Less than four months passed between plaintiff's filing of the complaint and defendant's filing of its motion for summary judgment. Plaintiff filed the pending Rule 56(f) motion promptly thereafter. He clearly has not been dilatory in his attempts to obtain discovery. Fallon has to date failed to ascertain whether the Handbook is the only instrument representing the employee welfare benefit plan purchased by GM from Fallon for the benefit of GM's employees. Given that this case is in its early stages, and that Fallon has been slow to comply with plaintiff's request for documents relating to the Fallon-GM plan, plaintiff has shown good cause why he cannot adduce the facts necessary to oppose defendant's motion for summary judgment.

2. *Utility of further discovery*

Plaintiff's requested discovery would be "useful" if it would suffice to raise a genuine issue of material fact and defeat summary judgment. *North Bridge Associates*, 22 F.3d at 1206. When pursuing a civil ERISA action, a claim may only be brought "by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). In the instant case, plaintiff is not seeking to recover benefits due to Mrs. Turner under the plan, and injunctive relief to enforce Mrs. Turner's rights under the plan is no longer viable. Plaintiff has therefore failed to demonstrate that his requested discovery would suffice to raise a genuine issue of material fact.

3. *Materiality of further discovery*

The threshold of materiality for Rule 56(f) is low. *North*

Bridge Associates, 22 F.3d at 1207. The kind of discovery plaintiff may conduct under Rule 56(f) is more restricted than the discovery he would be permitted to pursue during the ordinary discovery process. *See id.* The facts that plaintiff seeks to discover must be capable of "breathing life into his claim or defense." *Id.*

In the instant case, even if plaintiff discovers evidence demonstrating unequivocally that defendant's decision to deny coverage to Mrs. Turner was arbitrary and capricious, that evidence would not breathe life into his ERISA claim. Plaintiff is not seeking to recover benefits due to Mrs. Turner under the terms of his plan and, unfortunately, any rights she may have once possessed thereunder can no longer be enforced. Nor is plaintiff seeking to clarify his rights to future benefits under the terms of the plan. He clearly does not have a justiciable ERISA claim against Fallon, and therefore any discovery requested by plaintiff is immaterial. Whether plaintiff has other claims against other parties (which he may well have) is not an issue before this Court in these proceedings.

IV. CONCLUSION

This Court concludes that ERISA preempts any claim plaintiff could raise against Fallon, and that Mrs. Turner's death has effectively eliminated any chance of recovery under that statute. Although this result may appear unfair and is obviously frustrating to plaintiff, Congress afforded no remedy under ERISA to a participant for a violation by a plan administrator that may have contributed to the death of a beneficiary. This Court is bound by the statute and by the First Circuit's holding in *North Bridge Associates*. Plaintiff's ERISA claim is an exercise in futility, and this Court will therefore strictly apply

the Rule 56(f) requirements as set forth by the First Circuit in that case. Because plaintiff cannot show the utility or materiality of the discovery he seeks, plaintiff's Rule 56(f) motion is DENIED.

SO ORDERED.

s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated: May 10, 1996

APPENDIX D — RELEVANT STATUTES

29 U.S.C. § 1132

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought —

(1) by a participant or beneficiary —

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for, appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise' provided in subsection (b) of this

section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), or' (5) of (c) of this section or under subsection (i) or (1) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section. 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of thin title. (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this subtitle or the terms' of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

Appendix D

29 U.S.C. § 1144

§ 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Supreme Court, U.S.
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MAR 16 1998
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No. 97-1179

In The

Supreme Court of the United States

October Term, 1997

RONALD J. TURNER, as Administrator of the Estate of CHARLOTTE M. TURNER, and individually,

Petitioner,

vs.

FALLON COMMUNITY HEALTH PLAN, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court should reconsider and reverse its holdings in *Varity Corp. v. Howe*, 116 S. Ct. 1065, 1075-77 (1996) and *Mertens v. Hewitt Associates*, 113 S. Ct. 2063, 2068-69 (1993) that "damages," *i.e.*, monetary relief, are not "equitable" relief available as the only permissible relief under ERISA, 29 U.S.C. § 1132(a)?

2. Whether, in the absence of any conflict between the lower courts as to the principle that the operation of ERISA's preemption clause (29 U.S.C. § 1144(a)) does not depend upon whether ERISA provides a remedy to plan participants that is similar to an available state law remedy, the Court should reconsider its holdings in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) and *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), that Congress, in ERISA, intended to deny to the states any authority to regulate the design and administration of ERISA plan benefits?

3. Whether the Court has the authority to, and should, create a remedy involving compensatory and punitive damages against an ERISA plan fiduciary for an assertedly wrongful benefit denial decision, where neither the claimant nor the affected plan beneficiary timely sought available judicial review and equitable relief with respect to the fiduciary's coverage determination?

STATEMENT PURSUANT TO RULE 29.6

Fallon Community Health Plan, Inc., is a subsidiary of The Fallon Foundation which, in turn, is a subsidiary of Fallon Clinic, Inc. Fallon Clinic, Inc.'s shareholders are its physician employees and two wholly owned "second tier" subsidiaries of the Tenet Corporation, which hold a minority of the shares. Fallon Community Health Plan, Inc. does not have subsidiaries other than those which are wholly owned, nor does it have any affiliates that have issued shares to the public.

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Tolton v. American Biodyne, Inc., 48 F.3d 937 (6th Cir. 1995)	3
Turner v. Fallon Community Health Plan, Inc., 127 F.3d 196 (1st Cir. 1997)	1, 2, 5
Varity Corp. v. Howe, 116 S. Ct. 1065 (1996)	i, 3

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APPENDIX

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COUNTERSTATEMENT OF THE CASE

Petitioner's Statement of the Case omits certain parts of the record, and misstates others, which may bear upon the Court's determination whether a Writ of Certiorari to the United States Court of Appeals for the First Circuit to review its judgment in this case should issue. Petitioner contends that Fallon Community Health Plan, Inc.'s (hereafter "FCHP") decision not to cover the cost of a high dosage chemotherapy/autologous bone marrow transplant (hereafter "HDC/ABMT") protocol devised by Duke University Medical School "was arbitrary, illegal, capricious, unreasonable and not made in good faith and was a breach of fiduciary duty." Petition at 2.

The Appeals Court found, however, that FCHP's determination that Duke's HDC/ABMT protocol was not a covered plan benefit was warranted by the plain terms of the plan of coverage applicable to Petitioner's claim.

> Although the question of a damages remedy is an important one, it likely has no practical importance in this case. The central obligation of Fallon to Charlotte Turner is fixed by the terms of the health plan, and it would be difficult to find an exclusion more unequivocal than Fallon's written exclusion of bone marrow transplant for solid tumors.[1] Even if Fallon were treated as having modified the contract in August 1997,[2] the modification seemingly extended only to the Dana

---

1. It is undisputed that Charlotte Turner suffered from breast cancer that was a solid tumor cancer. *Turner v. Fallon Community Health Plan, Inc.*, 127 F.3d 196, 197 (1st Cir. 1997).

2. The 1997 date is a typographical error. The date is August 1993. *Turner*, 127 F.3d at 196-97, 200.

> Farber program, for which Charlotte Turner was admittedly ineligible. Thus, anything akin to a contract claim looks almost hopeless on this record.

Turner, 127 F.3d at 200.

With respect to Petitioner's state tort claims, the Appeals Court said this: "It is difficult to see how denial of an expressly excluded treatment could support a negligence claim. . . ." *Id.* Plainly, the Appeals Court concluded that, even if all applicable precedent were not against Petitioner's assertion that ERISA should provide compensatory and punitive damages as a remedy for a wrongful benefit denial, the incontrovertible facts compel the conclusion that no covered benefit was denied wrongly by FCHP. This is not a case, therefore, in which the Court's rejection of its own clear precedent as now sought by Petitioner, would result in a different substantive outcome for the Petitioner. Even if ERISA were construed to provide the remedies of compensatory and punitive damages, Petitioner's claim would fail because, as the Appeals Court decision unambiguously concludes, no covered benefit was denied to Mrs. Turner by FCHP.

REASONS FOR DENYING THE WRIT

There is no warrant for review of this case by the Court because its clear and consistent precedent holds that: (1) ERISA does not allow for either compensatory or punitive damages as a remedy; and (2) ERISA preemption of state law claims does not depend upon the existence of a parallel or analogous remedy under ERISA. In addition, ERISA does provide to plan participants and beneficiaries access to timely judicial equitable relief to remedy assertedly improper benefit denial decisions by plan fiduciaries. Moreover, Petitioner has not identified any conflicts between the Circuit of Courts of Appeal as to the issues

addressed and resolved by the Appeals Court for which Petitioner seeks review. In fact, no such conflicts exist. Last, as the Appeals Court pointed out, the revision to ERISA law sought by Petitioner calls for the exercise of legislative, not judicial, authority.

The Court clearly and unambiguously held in *Mertens*, 113 S. Ct. at 2068-69, that damage remedies, indeed all legal remedies, are not available under ERISA, which allows only for equitable remedies. This holding is reaffirmed in *Varity Corp.*, 116 S. Ct. at 1075-79. Indeed, it has been clear for more than a decade that neither compensatory nor punitive damages are available remedies under ERISA. *Massachusetts Mutual Life Insurance v. Russell*, 473 U.S. 134 (1985). *See also Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 47, 52-53 (1987).

Petitioner argues that because ERISA does not provide a remedy in damages for a wrongful benefit denial in circumstances when damages alone would be the only meaningful remedy, it cannot preempt state law claims that would allow the remedy in damages. This argument runs directly counter to the fundamental and indisputable proposition that Congress, in ERISA, specifically intended to deny to the states the authority to regulate ERISA plans with respect to such plans' design and administration of benefits. *Cf. Ingersoll-Rand*, 498 U.S. 144; *Pilot Life Insurance Co.*, 481 U.S. 52-57.

The Circuit Courts which have been confronted with Petitioner's argument that the absence of an ERISA remedy for an asserted wrong to a plan beneficiary requires the conclusion that ERISA does not preempt state laws that allow a remedy for the alleged wrong, all uniformly have rejected that argument. *See, e.g., Tolton v. American Biodyne, Inc.*, 48 F.3d 937, 943 (6th Cir. 1995). ("Nevertheless, plaintiffs argue that ERISA cannot preempt their state law claims because ERISA provides

no adequate remedy for the wrongs they allege. . . . Plaintiffs misconstrue the nature of ERISA preemption. That ERISA does not provide the full range of remedies available under state law in no way undermines ERISA preemption."); *Carlo v. Reed Rolled Thread Die Co.*, 49 F.3d 790, 792-94 (1st Cir. 1995); *Cf. Raymond v. Mobil Oil Corp.*, 983 F.2d 1528, 1537-38 (10th Cir. 1993) ("[W]e note that the fact that a state law claim may be preempted does not necessarily mandate that there be an ERISA remedy. *See Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1333 (5th Cir.). . . . *Cromwell v. Equicor HCE Corp.*, 944 F.2d 1279, 1276 (6th Cir. 1991) ('Nor is it relevant to an analysis of . . . preemption that appellants may be left without a remedy.') . . . *Lister v. Stark*, 890 F.2d 941, 946 (7th Cir. 1989))."

In *Lee v. E.I. Dupont de Nemours and Co.*, 894 F.2d 755, 756-57 (5th Cir. 1990), plaintiffs

> [p]ropose[d] a novel rule for construing [ERISA's preemption clause]. They argue that the scope of preemption should turn on the scope of . . . the ERISA civil enforcement provision. If a plaintiff's claim is cognizable under section 1132(a) . . . it is pre-empted by ERISA. If not, then section 1144 [the preemption clause] does not preempt the claim when asserted under state law.

The Fifth Circuit, like all the Circuit courts to which this argument has been presented, unhesitatingly held it to be inconsistent with ERISA precedent and the intent of Congress. If the Court were to reject this uniform position and accept Petitioner's preemption construct, the result would be to place in the hands of the states the capacity to define the remedies available against ERISA plans with respect to the latter's benefit determinations. Under that construct, each of the states could

determine ERISA plans' potential liabilities for their plan fiduciaries' benefit coverage determinations. Since at least the decision in *Pilot Life*, it has been clear that any such result is wholly at odds with the intent of Congress when it enacted ERISA's preemption clause.

Last, the core premise of Petitioner's argument is unsound. That premise is that ERISA does not provide an appropriate judicial remedy for a wrongful benefit denial. The Appeals Court expressly found that Mrs. Turner had available to her while she was alive, a judicial remedy for FCHP's assertedly wrongful denial of coverage for the Duke Protocol.[3] In its brief to the First Circuit, FCHP included an Appendix consisting of citations to approximately three dozen cases.[4] In each of these ERISA plan beneficiaries sought equitable relief from Federal courts to redress an assertedly wrongful denial by an ERISA plan of coverage for high dosage chemotherapy and bone marrow transplantation. That is the same form of treatment Mrs. Turner claimed she was entitled to have covered.

The record does not disclose why the Petitioner or Mrs. Turner did not pursue this available equitable remedy expressly authorized by ERISA (29 U.S.C. § 1132(a)(1)) before it was too late. The failure to pursue an available remedy, however, should not be confused with the absence of a remedy.

There is no basis for a review by the Court of the decision of the Appeals Court. The law upon which that decision is based is well-settled and founded upon the clearly applicable precedent decided by this Court. There is no evidence of conflict or confusion in the lower courts with respect to either whether

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3. *Turner*, 127 F.3d at 198-99.

4. That Appendix is replicated and included herewith as "Appendix A."

that precedent permits damage remedies under ERISA, or whether ERISA's preemption of state law claims depends upon the availability of a parallel ERISA remedy. Review is particularly unwarranted in this case. Petitioner's claims exist only because a readily available judicial remedy under ERISA was not timely pursued. That remedy might have helped Mrs. Turner herself if FCHP's interpretation of the plan documents were not justified. The remedy Petitioner now seeks, in contrast, does nothing for her, only provides pecuniary benefit to others and seeks only to have a punitive effect on FCHP. Congress, as this Court consistently has held, did not provide or intend that ERISA plans were to be subject to these remedies.

CONCLUSION

For these reasons, it respectfully is submitted that The Petition for Writ of Certiorari from the United States Court of Appeals for the First Circuit should be denied.

Respectfully submitted,

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APPENDIX A

Federal Circuit Court of Appeals Cases

Smith v. Office of Civilian Health & Medicine, 97 F.3d 950 (7th Cir. 1996) (Denying injunction for coverage of high dose chemotherapy with autologous stem cell rescue).

Bailey v. Blue Cross & Blue Shield of Va., 67 F.3d 53 (4th Cir. 1996) (Granting injunction for coverage of high dose chemotherapy.)

Henderson v. Bodine Aluminum, 70 F.3d 958 (8th Cir. 1995) (Granting injunction for high dose chemotherapy).

Wilson v. Office of Civilian Health & Medicine, 65 F.3d 361 (4th Cir. 1995) (Granting injunction for high dose chemotherapy with peripheral stem cell rescue).

Hendricks v. Central Reserve Life Ins. Co., 39 F.3d 507 (4th Cir. 1994) (Denying injunction for high dose chemotherapy with peripheral stem cell rescue).

Hooper v. Demco Inc., 37 F.3d 507 (7th Cir. 1994) (Denying injunction for high dose chemotherapy with peripheral stem cell rescue).

Fuja v. Benefit Trust Life Ins. Co., 18 F.3d 1405 (7th Cir. 1994) (Denying injunction for high dose chemotherapy with autologous bone marrow transplant).

Barnett v. Kaiser Foundation Health Plan, 32 F.3d 413 (9th Cir. 1994) (Denying injunction for transplant).

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Harris v. Mutual of Omaha Cos., 992 F.2d 706 (7th Cir. 1993) (Denying injunction for high dose chemotherapy with autologous bone marrow transplant).

Clark v. K-Mart Corp., 15 E.B.C. 1452 (3d Cir. 1992) (Denying injunction for high dose chemotherapy with autologous bone marrow transplant).

Federal District Court Cases

Velez v. Prudential Health Care Plan of New York, Inc., 943 F. Supp. 332 (S.D.N.Y. 1996) (Granting injunction for high dose chemotherapy with autologous bone marrow transplant).

Marro v. K-III Communs. Corp., 943 F. Supp. 247 (E.D.N.Y. 1996) (Granting injunction for high dose chemotherapy).

Bushman v. State Mutual Life Assurance Co. of Am., 915 F. Supp. 945 (N.D. Ill. 1996) (Denying injunction for high dose chemotherapy with autologous bone marrow transplant).

Hilliard v. Bellsouth Medical Assistance Plan, 918 F. Supp. 1016 (S.D. Miss. 1995) (Denying injunction for high dose chemotherapy with peripheral stem cell rescue)

Mattive v. Healthsource of Savannah, Inc., 893 F. Supp. 1559 (S.D. Ga. 195) (Granting injunction for high dose chemotherapy with peripheral stem cell rescue).

Kost v. Prudential Ins. Co. of Am., 1995 U.S. Dist. LEXIS 8151 (N.D. Ill. June 12, 1995) (Denying injuction for high dose chemotherapy with autologous bone marrow transplant).

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Grethe v. Trustmark Ins. Co., 881 F. Supp. 1160 (E.D. Ill. 1995) (Denying injunction for high dose chemotherapy with autologous bone marrow transplant).

Frendreis v. Blue Cross & Blue Shield of Mich., 873 F. Supp. 1153 (N.D. Ill. 1995) (Granting injunction for high dose chemotherapy with peripheral stem cell rescue).

Whitehead v. Federal Express Corp., 878 F. Supp. 1066 (W.D. Tenn. 1994) (Denying injunction for high dose chemotherapy with peripheral stem cell rescue).

Wilson v. Office of Civilian Health & Medicine, 866 F. Supp. 903 (E.D. Va. 1994) (Granting injunction for high dose chemotherapy with peripheral stem cell rescue).

Smith v. Office of Civilian Health & Medicine, 884 F. Supp. 303 (S.D. Ind. 1994) (Denying injunction for high dose chemotherapy with peripheral stem cell rescue).

Mashburn v. Mail Handlers Benefit Plan, 18 E.B.C. 2668 (M.D. Tenn. 1994) (Granting injunction for high dose chemotherapy with peripheral stem cell rescue).

Hasty v. Central States, Southeast & Southwest Area Health & Welfare Fund, 851 F. Supp. 1250 (N.D. Ind. 1994) (Denying injunction for high dose chemotherapy with peripheral stem cell rescue).

Wheeler v. Dynamic Engineering, Inc., 850 F. Supp. 459 (E.D. Va. 1994) (Granting injunction for high dose chemotherapy with peripheral stem cell rescue).

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Gripkey v. Mail Handlers Benefit Plan, 1994 U.S. Dist. LEXIS 20619 (D.S.C. Feb. 15, 1994) (Granting injunction for high dose chemotherapy with peripheral stem cell rescue).

Hawkins v. Mail Handlers Benefit Plan, 18 E.B.C. 2571 (W.D.N.C. 1994) (Granting injunction for high dose chemotherapy with peripheral stem cell rescue).

Reger v. Espy, 836 F. Supp. 869 (N.D. Ga. 1993) (Denying injunction for high dose chemotherapy with autologous bone marrow transplant).

Goepel v. Mail Handlers Benefit Plan, 1993 U.S. Dist. LEXIS 13346 (D.N.J. Sept. 23, 1993) (Denying injunction for high dose chemotherapy with autologous bone marrow transplant).

Leonhardt v. Holden Business Forms Co., 828 F. Supp. 657 (D. Minn. 1993) (Granting injunction for high dose chemotherapy with autologous bone marrow transplant).

McLeroy v. Blue Cross & Blue Shield of Ore., Inc., 825 F. Supp. 1064 (N.D. Ga. 1993) (denying injunction for coverage of high dose chemotherapy with autologous bone marrow transplant).

Kekis v. Blue Cross & Blue Shield of Utica-Watertown, Inc., 815 F. Supp. 571 (N.D.N.Y. 1993) (Granting injunction for high dose chemotherapy with autologous bone marrow transplant).

Kulakowski v. Rochester Hospital Service Corp., 779 F. Supp. 710 (W.D.N.Y. 1991) (Granting injunction for high dose chemotherapy with autologous bone marrow transplant).

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White v. Caterpillar, Inc., 765 F. Supp. 1418 (W.D. Mo. 1991) (Granting injunction for high dose chemotherapy with autologous bone marrow transplant).

Rollo v. Blue Cross & Blue Shield of N.J., 1990 U.S. Dist. LEXIS 5376 (D.N.J. Mar. 22, 1990) (Granting injunction for high dose chemotherapy with autologous bone marrow transplant).

(3)

No. 97-1179

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In The

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RONALD J. TURNER, as Administrator of the Estate of CHARLOTTE M. TURNER, and individually,

Petitioner,

vs.

FALLON COMMUNITY HEALTH PLAN, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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The Petitioner has prepared this Reply to Respondent's Brief in Opposition to Petitioner's Petition for Writ of Certiorari.

I.

On page 1 of Respondent's Brief, Respondent ("Fallon") quotes the Appeals Court in its decision in the case at bar. The thrust of the quotation is that the provisions of the health plan, which is the subject matter of the litigation, did not obligate the health plan to provide the type of treatment required by the Decedent ("Charlotte"). Charlotte required a certain type of bone marrow transplant for solid tumors relating to her breast cancer. The Appeals Court stated that Fallon, under the terms of the health plan, not only had no obligation to provide that type of treatment, but that that type of treatment was specifically excluded from coverage under the terms of the health plan.

The Petitioner had acknowledged that the contract that set forth the health plan initially excluded such bone marrow transplants. *See* Petitioner's Brief, Page 3. However, the health plan had been amended by Fallon to provide for such treatment under a technique or program carried on by Dana Farber, a well known hospital specializing in the treatment of cancer and located in Boston, Massachusetts. The Petitioner stated on Page 3 of his Petition for Writ of Certiorari that Fallon had *further amended* its plan so that such types of treatment by institutions other than Dana Farber would be covered but would be approved on a case by case basis and that a determination of whether or not any such type of treatment at other institutions was suitable to provide treatment for patients like Charlotte would be made by a committee of Fallon personnel.

The Appeals Court never took into account the fact that there was a vote of the appropriate policy and review subcommittee of Fallon on August 23, 1993 which amended

the health plan so that criteria would be established for coverage on an emergency case by case basis to provide treatment at hospitals other than Dana Farber. This change in policy was set forth in a four page document dated August 30, 1993 which was exhibit 2 at the trial and is contained on pages 85 through 88 of the Appendix filed with the Appeals Court. It is clear that the Appeals Court overlooked this document in rendering its decision. Therefore, for appellate purposes, there is every reason to believe that the finding of the Appeals Court that even if remedies for compensatory and punitive damage were allowed, the Petitioner's claim would fail because no "covered benefit" was denied to Charlotte by Fallon, would be quickly overruled by the Supreme Court.

II.

In its Brief, Fallon states that there are no conflicts between the Circuits of Courts of Appeal as to the issues addressed and ruled on by the Appeals Court in the case at bar. Of course no conflict exists. The United States Supreme Court has issued very clear rulings on this subject matter and it is totally inappropriate, if not illegal, for the Circuit Courts or District Courts to rule contrary to explicit decisions of the Supreme Court. It is certainly to be noted that there are cases too numerous to cite in which the Trial Judges and Appellate Judges have articulately stated that the reasoning and rationale of *Massachusetts Mutual Life Insurance Co., et al. v. Russell*, 473 U.S. 134, 87 L. Ed. 2d 96, 105 S. Ct. 2085 (1985) and *Pilot Life Insurance Co. v. Dedeaux*, 48 U.S. 41, 95 L. Ed. 2d 39, 107 S. Ct. 1549 (1987), and their progeny have led to illogical and irrational decisions; and that the courts are not pleased with this. During oral argument in the case at bar Judge Boudin, the Chief Judge of the three Appellate Judges, stated from the bench that the story of Charlotte and her family was one of the saddest stories that he has ever heard. Furthermore, the Trial Judge in

the case at bar said that he was ruling against the Plaintiff "sadly". As set forth in the Plaintiff's Petition for Writ of Certiorari, Justices Stevens, Scalia and Ginsberg have each expressed dissatisfaction with the present posture of the state of law on the subject matter of the case at bar.

III.

The Respondent, in its Brief, argues that the Appeals Court expressly found that Charlotte had available to her while she was alive a judicial remedy for Fallon's allegedly wrongful denial of coverage and she could have sought judicial relief. However, a review of the decision shows that the Appeals Court stated that although judicial relief is readily frustrated by the exhaustion of remedy rules, the failure to exhaust is easily forgiven for good reason. No evidence was presented at the Trial Court, nor decision made by the Trial Court, nor is it contained in the record, as to whether or not Charlotte, while she was alive, had an opportunity to go into Federal Court or, whether she ought to be held (while desperately ill) to the choice of choosing between continuing with administrative procedures or seeking judicial remedies; or whether she was really responsible for the fact that her health deteriorated markedly and fatally while she was involved in administrative procedures.

CONCLUSION

The case at bar presents an ideal and almost perfect case for the Supreme Court to grant the Writ of Certiorari if the Supreme Court wishes to revisit, as Justice Stevens stated, the issues involved in this case. It would be hard to envision a case that is more perfect on its facts and on the record to use as a vehicle for review of the present law dealing with the subject matter.

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